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Supreme Court, U.S.
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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT
OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is a "futility exception" to the mandate of 28 U.S.C. § 1447(c), which states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded."

LIST OF PARTIES

Respondent, KEITH D. SCHACHT, is referred to as "plaintiff." He sued, as defendants, WISCONSIN DEPARTMENT OF CORRECTIONS, and the following employees of Oakhill Correctional Institution: CATHERINE J. FARREY, individually and in her official capacity as warden, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden, RITA SMICK, individually and in her official capacity as personnel manager, THOMAS LALIBERTE, individually and in his official capacity as an employee, RANDALL HEPP, individually and in his official capacity as an employee, and ONE OR MORE JOHN DOES, individually and in their official capacities as employees. Defendant, Wisconsin Department of Corrections, a State agency, employs the individual defendants and operates Oakhill Correctional Institution. Although plaintiff was not granted leave to amend his pleadings to specify the unnamed defendants, he moved the district court for leave to add another Oakhill employee, Sergeant B. J. MIKKLESON.

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OPINIONS BELOW

The court of appeals opinion is reported in *Schacht v. Wisconsin Department of Corrections*, 116 F.3d 1151 (7th Cir. 1997) and reprinted in the Petition for Writ of Certiorari[1] at App. 1-6. The district court opinion is unreported and reprinted at App. 7-14.

JURISDICTION

The court of appeals decision was issued June 17, 1997. App. 1. The Petition for Writ of Certiorari was filed timely. The district court granted defendants' motion for summary judgment and entered judgment on the merits. App. 14. The court of appeals had jurisdiction under 28 U.S.C. § 1291, vacated the judgment, and directed a remand of this removed action to the state court. App. 6. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 700 (1972).

[1] Because there is no need for one, this response brief has no appendix. The appropriate documents are reprinted in the Appendix to the Petition for Writ of Certiorari (hereinafter referred to as "App.").

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1441 provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28 U.S.C. § 1447(c) provides in pertinent part:

> (c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

STATEMENT OF THE CASE

Schacht filed an action in Dane County Circuit Court in the State of Wisconsin alleging claims under 42 U.S.C. § 1983 for deprivation of substantive and procedural rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, when he was suspended without pay in January of 1993 and was terminated from his employment in February of 1993.

App. 1-2. Defendants removed the action to the United States District Court for the Western District of Wisconsin without objection from Schacht. App. 1-3. The district court heard and decided defendants' dispositive motions and entered an order dismissing plaintiff's claims against the state agency and the defendants in their official capacities on Eleventh Amendment grounds, denying plaintiff's request to name a new defendant, finding that the plaintiff had failed to assert a substantive due process claim, and granting summary judgment to defendants on the remaining individual capacity claims. App. 10-14. On appeal the United States Court of Appeals for the Seventh Circuit noted during oral argument that it appeared that the district court lacked subject matter jurisdiction, and the court requested that the parties file supplemental briefs on that issue. App. 3-5. On the basis of its previous holding in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994), *cert. denied*, 513 U.S. 876 (1994), the court of appeals vacated the judgment of the district court and remanded the case with instructions for the district court to remand the entire action to state court. App. 6.

REASONS FOR DENYING THE WRIT

I. AS THIS COURT HAS ALREADY DETERMINED IN *INTERNATIONAL PRIMATE PROTECTION LEAGUE V. ADMINISTRATORS OF TULANE EDUCATIONAL FUND*, THERE IS NO FUTILITY EXCEPTION TO 28 U.S.C. § 1447(c).

The Court has made it clear that there is no "futility exception" to the remand mandate of 28 U.S.C. § 1447(c). *See International Primate Protection League v. Administrators*

of Tulane Educational Fund, 500 U.S. 72, 89 (1991) (noting "the literal words of § 1447(c), which, on their face, give no discretion to dismiss rather than remand an action"). Whether or not that was the holding of the Court, which may be in doubt,[2] the Court's reasoning was unmistakable and controlled the disposition of the case.

In *International Primate*, an animal rights group had brought suit in state court seeking to bar Tulane University and the National Institutes of Health (NIH) from euthanizing monkeys and from conducting subsequent autopsy research, and the NIH removed the action to federal court. *Id.* at 74-75. The Supreme Court held that the statute authorizing removal of state suits by federal officers does not permit removal by federal agencies and that the animal rights groups had standing to challenge removal. *Id.* at 77 and 79. Having concluded that NIH lacked authority to remove the suit to federal court, the Court proceeded to determine whether the case should be remanded to state court. *Id.* at 87. The Court said, "Section 1447(c) of Title 28 provides that, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed

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[2] The Court of Appeals for the Third Circuit recently followed the Court's decision in *International Primate*, although it said that the Court's unwillingness to recognize a "futility exception" had been expressed "in dicta." *Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 213 (3rd Cir. 1997). However, inasmuch as the Court's handling of the issue under the facts in *International Primate* was explicit and dispositive of the case, it reasonably may be viewed as a determinative ruling on the merits of the issue, as it has been treated by the vast majority of the circuit courts of appeals. *See* Section II *infra*.

from state court], the case shall be remanded.' " *Id.* (brackets in the original). Then the Court reasoned that, "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *Id.*

The Court noted that, "NIH asks us to affirm the Court of Appeals' dismissal of this suit on the grounds that a remand of petitioners' claims to Louisiana court would be futile." *Id.* After acknowledging the futility asserted by NIH, the Court said, "[W]e decline to speculate on the proper result." *Id.* at 89. In doing so, the Court expressly noted " 'the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action.' " *Id., quoting Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services*, 876 F.2d 1051, 1054 (1st Cir. 1989) (then-Judge Breyer writing for the court). Finally, the Court gave emphasis to the words "shall be remanded" in the wording of 28 U.S.C. § 1447(c). *See id.* ("The statute declares that, where subject matter jurisdiction is lacking, the removed case *'shall* be remanded.' " (emphasis added by the Court in the original)).

Thus, the Court made it abundantly clear that its strict interpretation of 28 U.S.C. § 1447(c) leaves no room for a "futility exception." That result is consistent with very long standing decisions of the Supreme Court. As the Court of Appeals for the Fifth Circuit said, "The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case." *In re Carter*, 618 F.2d

1093, 1100 (5th Cir. 1980) (*citing American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951)), *cert. denied*, 450 U.S. 949 (1981).

The Supreme Court itself has said, "The jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties," noting a long line of cases dating back to and before the Dred Scott Case. *American Fire & Casualty Co. v. Finn*, 341 U.S. at 17-18 text and n.17. In *American Fire*, the case had been removed without right from state to federal court at the request of the defendant. *Id.* at 17. The federal court lacked original jurisdiction at its inception, and up to and including the time of judgment the district court continued to be without jurisdiction. *Id.* The Court held that the defendant who removed the action was not estopped after judgment from protesting that there was no right to removal. *Id.* at 18. The Court ordered the cause remanded to the district court with directions to vacate the judgment and to remand the case to state court. *Id.* at 18-19.

American Fire and *International Primate* are both analogous to the case at bar. In a recent decision, citing numerous relevant Supreme Court decisions, the Court said:

> As explained in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986):
>
> > "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede

> > it. *Mitchell v. Maurer*, 293 U.S. 237, 244 [55 S.Ct. 162, 165, 79 L.Ed. 338] (1934). . . . 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purposes of correcting the error of the lower court in entertaining the suit.' *United States v. Corrick*, 298 U.S. 435, 440 [56 S.Ct. 829, 831-832, 80 L.Ed. 1263] (1936) (footnotes omitted)." *Bender*, 475 U.S., at 541, 106 S.Ct., at 1331 (brackets in original).

See also *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 72-73, 104 S.Ct. 373, 375-376, 78 L.Ed.2d 58 (1983) (per curiam) (vacating judgment below where Court of Appeals had ruled on the merits although case had become moot).

Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1071-1072 (1997). The Court of Appeals for the Seventh Circuit has handled the instant action in a manner consistent with those clear precedents from the Supreme Court.

II. MOST OF THE CIRCUIT COURTS OF APPEALS ADHERE TO THE RULING IN *INTERNATIONAL PRIMATE*, AND PETITIONERS RELY UPON A FEW ABERRANT COURT OF APPEALS DECISIONS WHICH PREDATE OR FAIL TO CONSIDER *INTERNATIONAL PRIMATE*.

In the case at bar the Seventh Circuit correctly followed *International Primate* and its own sentinel case on the subject, *Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994).

See Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997) (App. 1-6). The court acknowledged defendants' argument that "remand would be futile and would result in a waste of judicial resources." *Id.* at 1153 (App. 5). The court countenanced the same arguments made by the defendants as petitioners to this Court:

> Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis. 1989) (noting that "states are not 'persons' within the meaning of sec. 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (noting that "sec. 1983 actions do not lie against a State").

Id. Then, relying upon the most recent applicable decisions from this Court, the court said:

> Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See *Arizonans*, ___ U.S. at ___, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility exception" to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed. 2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added).

Id. The disposition of the instant action by the court below – rejecting the same arguments made by petitioners in the Petition for Writ of Certiorari – was consistent with all applicable precedents from this Court. A contrary decision would have been contrary to the applicable or analogous decisions of the Supreme Court.

Since the decision in *International Primate*, petitioners' proposed "futility exception" has been expressly rejected by the circuit courts of appeals for the Third, Fourth, and Seventh Circuits. *See Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 214 (3rd Cir. 1997) ("[W]e hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility."); *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996) (noting that "the futility of a remand to the West Virginia state court does not provide an exception to the plain meaning of § 1447(c)"); *Schacht*, 116 F.3d at 1153 (App. 5) (holding that "there is no 'futility' exception to § 1447(c)"); *Gorka By Gorka v. Sullivan*, 82 F.3d 772, 774-775 (7th Cir. 1996) (following the holding in *Frances J.* that the entire case should be remanded, if the federal court does not have original jurisdiction because of a claim barred by sovereign immunity); *International College of Surgeons v. City of Chicago, Illinois*, 91 F.3d 981, 993-994 (7th Cir. 1996) ("removal is proper only if the action originally could have been brought in the district court"), *cert. granted*, ___ U.S. ___, 117 S.Ct. 1424 (1997); *Frances J. v. Wright*, 19 F.3d 337, 341 (7th Cir. 1994) ("if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, . . . then as a consequence of § 1447(a), the whole action cannot be

removed to federal court."), *cert. denied*, 513 U.S. 876 (1994); *Smith v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1139 (7th Cir. 1994) ("[T]he Supreme Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of § 1447(c)"). The Tenth Circuit also has expressly rejected the proposed "futility exception" in an unpublished opinion. *See Jepsen v. Texaco, Inc.*, 68 F.3d 483, 1995 WL 607630, at *3 (10th Cir. 1995) (noting that the Supreme Court has expressly rejected a futility exception in *International Primate*).

Additionally, in a case decided prior to *International Primate* and explicitly noted in *International Primate*, the First Circuit expressly refused to adopt the futility exception, stating that "the fact that we believe a certain legal result *unlikely*, as a matter of state law, is not sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded'." *Maine Association of Interdependent Neighborhoods*, 876 F.2d at 1055 (1st Cir. 1989) (emphasis in the original). The Second Circuit also has recognized that such an exception probably does not exist in light of the decision in *International Primate*. *Barbara v. New York Stock Exchange*, 99 F.3d 49, 56 n.4 (2nd Cir. 1996).

Only the Fifth and Ninth Circuits have recognized the proposed "futility exception." *See Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (allowing dismissal because the state court would be bound by the federal appellate court's ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction); *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991) (ruling

that dismissal was appropriate where remand was futile). However, both *Asarco* and *Bell* were decided prior to this Court's decision in *International Primate*.[3]

In the Petition for Writ of Certiorari petitioners argue:

> [T]he appellate court should have recognized that, as a non-jurisdictional matter, § 1983 claims simply cannot be made against States and turned to the merits of the appeal. This was the procedure followed by the Ninth Circuit Court of Appeals in *Kruse v. State of Hawai'i*, 68 F.3d 331 (9th Cir. 1995) which, sharply criticizing the rationale in *Frances J.*, held that district courts should dismiss removed claims to which Eleventh Amendment immunity might apply by focusing on this definitional analysis rather than any jurisdictional questions. 68 F.3d at 334.

Petition at 18-19. *Kruse*, in rejecting the logic of the Seventh Circuit in *Frances J.*, adopted what it called "the better-reasoned approach of the Sixth Circuit" in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990). *See* 68 F.3d at 334-335. However, the decision in *Henry* also predated this Court's decision in *International Primate*. The *Kruse* decision does not even mention *International Primate*, which was decided more than four years before *Kruse*.

The flaw in petitioners' argument and in the approach taken by the Ninth Circuit in *Kruse* is related to

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[3] *Asarco* was decided September 14, 1990, and *Bell* was decided January 8, 1991. *International Primate* was decided May 20, 1991.

the reason the Supreme Court declined "to speculate on the proper result" in *International Primate*. 500 U.S. at 89. That is, the Court lacked subject matter jurisdiction, which was necessary as a predicate for undertaking the inquiry into the alleged futility. As the Seventh Circuit has said, "[T]he point of § 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance. The merits of the state law claim are therefore irrelevant to this determination." *Smith*, 23 F.3d at 1339 n.10. That conclusion reflects the fact that " '[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . ' " *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)).

In addressing the subject matter of the issue raised in the Petition, this Court and the federal courts generally make reference to "the literal words of § 1447(c)" and specifically to the phrase "shall be remanded." *See, e.g., International Primate*, 500 U.S. at 89. In addressing the specific argument of petitioners and the aberrant approach of the Ninth Circuit in *Kruse*, however, respondent focuses upon other words in the sentence, "If at any time before final judgment *it appears that* the district court lacks subject matter jurisdiction, *the case* shall be remanded." (Emphasis added.) The literal words of § 1447(c) on their face support the interpretation that there is no futility exception. First, § 1447(c) states that the case shall be remanded if *it appears that* the district court lacks subject matter jurisdiction, implying that the case shall be remanded if the problem of subject matter jurisdiction appears to exist – not that there shall be a

detailed inquiry into the matter by the federal court before remand occurs. Secondly, § 1447(c) provides that, when it appears that the district court lacks subject matter jurisdiction, *the case* shall be remanded, implying that the entire action shall be remanded – not specific claims or other subparts of "the case." Indeed, one need not look further than the literal words of 28 U.S.C. § 1447(c) to see that the Petition should be denied.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

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